BANK BUMIPUTRA (M) BHD.

v.

KUMPULAN KESUMA SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D3-23-1237-88]
20 FEBRUARY 1992

BANKING : *Loan by bank to 1st defendant - Repayment secured by absolute assignment of 1st defendant's interest in lots - Manager of plaintiff appointed attorney - Power to sell - Joint and several guarantee by other defendants - Whether power of sale should first be exercised before bank looks to suing defendants.*

CIVIL PROCEDURE: *Defendant's appeal against summary judgment - Bank secured deed of assignment as well as guarantee - Question as to whether the power to sell under the deed of assignment ought to be exercised before exercising right to take legal action against borrower and guarantors - Whether this is a triable issue - Contention amount guaranteed by guarantors unclear - Whether this gives rise to triable issue.*

The first defendant (KK) obtained a loan from the plaintiff bank (BBMB). KK then assigned absolutely to BBMB two lots of land on which shophouses were to be built as security for the said loan. The manager of the bank was given the power of attorney to sell the lots. The other defendants had further executed a guarantee for the said loan.

BBMB sued the borrower and the guarantors and obtained summary judgment. The defendants appealed.

Held:
This was not a plain and obvious case; summary judgment was inappropriate.

[1] In the aforementioned deed of assignment, there is no clause expressly reserving the plaintiff's right to take legal action at any time against the guarantors independent of the rights under the deed of assignment. This must be contrasted with the case of *Bank Bumiputra (M) Bhd. v. Sykt. Kejuruteraan Hong Huat Sdn. Bhd.* [1989] 1 CLJ (Rep) 333 where the absolute deed of assignment contained a clause to that effect. It is a triable issue as to whether the power to sell should be first exercised before the defendants are sued.

[2] Upon examination of the terms of the guarantee, the plaintiff's exact entitlement as against the guarantors is a triable issue.

[Appeal allowed with costs. Defendants given unconditional leave to defend.]

Cases referred to:
Bank Bumiputra Malaysia Bhd. v. Sykt. Kejuruteraan Hong Huat Sdn. Bhd. [1989] 1 CLJ 333 ***(cit)***
Bank Bumiputra Malaysia Bhd. v. Sykt. Sungai Lesong Sdn. Bhd. [1989] 1 CLJ (Rep) 337 ***(cit)***

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff/respondent - S.C. Teh; M/s. Soo Thien Ming & Shahrizat
For the 1st, 2nd & 3rd defendants/appellants - B.E. Teh; M/s. Teh & Associates

JUDGMENT

VC George J:

To secure the repayment of the loan to the 1st defendant there was what appears to be an absolute assignment of the 1st defendant's assignor's interest in a sale and purchase agreement of two lots of land on which shophouses were to be built. The assignment agreement expressly states that the assignment is absolute. By clause 15 the manager of the plaintiff was appointed attorney of the 1st defendant assignor with power to do various things in the name of the assignor including selling the lots.

Clause 19 provides for the 1st defendant to be liable for any shortfall in the event that there is an exercise of the power of sale to recover the amounts owing by the borrower.

The plaintiff had also obtained a joint and several guarantee from the 2nd and 3rd defendants and one Tengku Zaid (now deceased).

By this writ the plaintiffs have sued the borrower and the guarantors without exercising the said power of sale.

It is contended that whether the bank has to first exercise its power of sale before suing the defendants is a triable issue.

It is interesting to note that the deed of assignment in *Bank Bumiputra Malaysia Bhd. v. Syarikat Kejuruteraan Hong Huat Sdn. Bhd.* [1989] 1 CLJ (Rep) 333 where it was expressly stated that the assignment was absolute, there was Clause 7 which provided that

> the deed of assignment is without prejudice to the right of the bank to take legal action at any time against the assignor ...

There is no such reservation in the instant agreement.

It was also submitted that what amount that the guarantors had guaranteed is not clear. Clauses 1 and 11 of the guarantee are as follows:

> 1. I/We will pay you on demand as follows:
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> (i) The sum of (Ringgit: Sixty Thousand Only) (RM60,000) (hereinafter called "the Guaranteed Sum") and any part of the moneys hereby guaranteed which is now or shall at any time be owing or remain due and unpaid to you from the Borrowers.
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> (ii) interest at the rate of 10.0% per annum or at such other rate as may be determined by the Bank from time to time.
>
> (iii) commission and other expenses and all cost charges and expenses which you may incur in enforcing or seeking to obtain payment of all or any part of the moneys hereby guaranteed and to make good any default by the Borrower or its successors-in-title in payment of the sum hereby guaranteed or any part thereof.
>
> 11. You may enforce this Guarantee against me/us at any time notwithstanding that any bills or other instrument covered by it may be in circulation or outstanding and include the amount of the same or any of them in the said general balance or not at your option and this Guarantee shall not be determinable by me/us except on the terms of making full provision up to the limit of the Guaranteed Sum together with interest thereon and any other outstanding liabilities or obligations on the part of the Borrower and on the Borrower's account.

The bank had sued the guarantor for the full amount said to be owing by the 1st defendant which is RM102,301.41 and further interest and costs.

In *Bank Bumiputra Malaysia Bhd. v. Syarikat Sungei Lesong Sdn. Bhd.* [1989] 1 CLJ (Rep) 337, Peh Swee Chin J examined an identical letter of guarantee and if his judgment is to be followed here, the claim against the guarantor would have to be reduced to RM60,000. What the plaintiff's entitlement as against the guarantors is a triable issue.

O. 14 is available in plain and obvious cases while this is not.

The appeal is allowed with costs. The defendants are given unconditional leave to defend.

Also found at [1992] 3 CLJ 1711